MEMORANDUM OF LAW

TO: Chuck Figur

FROM: Kristen Cassisa
Summer Clerk

DATE: September 1, 1998

RE: RCRA Use, Reuse and Reclamation

I. Introduction

The Federal Register proposal of April 4, 1983 and the final draft of January 4, 1985 are critical in determining whether there is a difference between use, reuse and reclamation. In the January 4, 1985 Federal Register, the Environmental Protection Agency finalized the April 4, proposal. These two preambles give insight on the Agency's practices of recycling management.

The goal of RCRA and the Environmental Protection Agency is protection of the environment. Thus, regulation of certain production processes is necessary. Use, reuse and reclamation are useful tools in helping to further this goal. However, materials treated similar to disposal, can cause harm to the environment.

II. Issue Presented

The issue is whether there is a difference between use, reuse and reclamation.

III. Brief Answer

Yes; there is a difference between use, reuse and reclamation. Reclaimed material is material that is processed to recover a usable product or is regenerated. Activities involving use and/or reuse do not constitute reclamation.

IV. Discussion

In the January 4, 1985, Federal Register, the EPA finalized the April 4, 1983, proposal. The final rule states the following for secondary materials being recycled, (1) one must know both what the material is and how it is being recycled before determining whether or not it is a Subtitle C waste, (2) directly placing wastes or waste-derived products onto the land, burning waste or waste fuels for energy recovery, reclamation and speculative accumulation are uses constituting disposal. Extending jurisdiction to waste-derived products placed on the land represents an addition to the proposal.

Reclaimed material is material that is "processed to recover a usable product, or if it is regenerated." 40 C.F.R. § 261.1(c)(4) (1998). The April 4, proposal clarifies this definition. It explains that regeneration processes involve removing of contaminants or impurities so that the material can be put to further use. The proposal states that activities involving use or reuse of materials do not constitute reclamation. A material is used or reused if it is: "(i) Employed as an ingredient . . . in an industrial process to make a product . . . or (ii) Employed in a particular function or application as an effective substitute for a commercial product . . . ." 40 C.F.R. § 261.1(c)(5) (1998). "A material is recycled if it is used, reused or reclaimed." 40 C.F.R. § 261.1(7) (1998). Use, reuse and reclamation are distinct components of recycling.

The proposal states that potential dangers to the environment are present "when wastes are reclaimed in surface impoundments or stored in impoundments before reclamation. In fact, reclamation in surface impoundments is very similar to a use or reuse constituting disposal: both involve direct, uncontrolled placement of waste in the land." 48 Fed. Reg. 14472, 14486 n. 27. Essentially, this means that the agency finds it necessary to regulate these activities because they pose significant dangers to the

environment. The agency also states that "[b]y using the language 'reclaimed or otherwise processed' . . . the agency means to cover virtually all management activities occurring in surface impoundments involving material recovery for subsequent use, reuse or additional reclamation, or involving processing designed to make the impounded material amenable for recovery." Id. As long as the material is in a surface impoundment, the agency will regulate no matter what the intended activity is. This allows the agency to regulate and help protect from pollution. It is important to note that the agency stated that "an impoundment would not be regulated under this provision only if all of the material in it that could be a hazardous waste is recycled back to the original production process." Id. at 14488 n. 32.

The April 4, 1983 proposal states that three types of activities involving the use or reuse of spent materials, sludges, or byproducts are not reclamation. The final rule did not significantly change these three types of activities involving use or reuse of secondary materials. The first of these activities uses materials as ingredients to make new products, without distinct components of the materials being recovered as end products. This exception does not apply when the material is itself recovered or when its contained material values are recovered as an end product. The final rule clarified that this occurs when the secondary material is directly used in this manner. "However, when distinct components of the material are recovered as separate end products (i.e. recovering lead from scrap metal in smelting operations), the secondary material is not being used, but rather reclaimed and thus would not be excluded under this provision." 50 Fed. Reg. 614, 619. This is a situation where materials that normally are used or reused become reclaimed materials. The final rule modified the proposal stating that when secondary

materials are returned to the original primary production process without first being reclaimed, the activity is not reclamation. *Id.* at 620.

The second activity that is not reclamation is using secondary materials as substitutes for raw materials in processes that normally use raw materials as principle feedstocks. An example of this is sludges or spent materials used as substitutes for ore concentrate in primary smelting. This is not true in secondary smelting because that process is inherently waste-based.

Finally, the proposal states that using the materials as substitutes for commercial products in particular functions or applications does not constitute solid waste management. 48 Fed. Reg. 14472, 14487 (1998).

The final rule stated, as proposed, that secondary metal reclamation processes, such as secondary smelting, are examples of material recovery. Spent materials, listed sludges, and listed byproducts processed to recover usable products are solid wastes. The agency amended that commercial products derived from hazardous wastes are products. It stated that "reclaimed metals that are suitable for direct use, or that only have to be refined to be usable are products not wastes." 50 Fed. Reg. at 634. However, this does not apply to reclaimed materials that are not ordinarily commercial products.

Some secondary products are difficult to characterize as wastes or non-wastes when reclaimed. Many secondary products in the mining industry are processed to further recover usable metals. This makes it difficult to distinguish between products and wastes. Therefore, the preamble to the final rule states that the agency must evaluate these materials individually before determining whether they are subject to RCRA. In addition, inherently waste-like materials are designated as solid wastes. The final rule

emphasized that to determine if a secondary material is a RCRA solid waste when recycled, one must examine both the material and the recycling activity involved. This is because the same material is a waste if recycled in certain ways, but is not a waste if recycled in other ways. For example, an unlisted byproduct that is reclaimed is not defined as a solid waste. However, the same byproduct is defined as a waste if it is recycled by being (a) placed on the land for beneficial use, (b) incorporated into a product that is placed on the land for beneficial use, (c) burned as a fuel, (d) incorporated into a fuel, or (e) accumulated speculatively. 50 Fed. Reg. 614, 618-19.

The final rule restated that "commercial products reclaimed from hazardous wastes are products, not wastes, and so are not subject to the RCRA Subtitle C regulations." 50 Fed. Reg. at 633. However, this does not apply to reclaimed materials that are not commercial products. This also does not apply to wastes that were processed minimally, or to materials that were partially reclaimed but must be reclaimed further before recovery is completed. *Id.*

The final rule clarified activities where secondary materials are not solid wastes. These three activities entail: (1) using or reusing secondary materials as ingredients or feedstocks in production processes, (2) using or reusing secondary materials as effective substitutes for commercial products and (3) return of secondary materials to the original primary production process in which they are generated without first reclaiming them. These activities do not include waste management and thus are not subject to regulation.

The April 4, 1983 proposal and the January 4, 1985 final rule are critical in establishing the distinctions between use, reuse and reclamation. However, the EPA has

not ended its discussions on the definition of recycling. Later Federal Registers and cases dealt with this issue as well.

The January 8, 1988, Federal Register proposal discusses *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1990). Petitioners in this case are seeking review of the EPA's final decision to relist as hazardous materials, six wastes generated from metal smelting operations. Petitioners felt that it was beyond EPA's statutory authority to bring materials that are not discarded, or otherwise disposed of within the compass of a waste. When a waste is hazardous, the waste's treatment, storage, and disposal are regulated by permit. *Id.* The case states that "under the final rule, materials are considered solid waste if they are abandoned by being disposed of, burned, or incinerated; or stored, treated, or accumulated before or in lieu of those activities. In addition certain recycling activities fall within EPA's definition." *Id.* at 1180. This rule is from the January 4, 1985 Federal Register discussed previously. The case discusses the final rule in order to show that EPA acted within its statutory jurisdiction. The case also states that "EPA determines whether a material is a RCRA solid waste when it is recycled by examining both the material or substance itself and the recycling activity involved." *Id.* Ultimately, the EPA must decide on a case by case basis whether the material is a solid waste. The case reiterates that secondary materials constitutes solid waste when they are disposed of, burned, used to produce a fuel, reclaimed, or accumulated speculatively. The case also notes the same exemptions where recycled materials are not solid wastes. These exemptions are when the material is used or reused as ingredients in an industrial process to make a product (provided the materials are not being reclaimed), or used or reused as effective substitutes for commercial products, or

returned to the original process from which they are generated, without first being reclaimed. Also exempt are petroleum refining wastes or oils recovered from such wastes that are recycled by reinserting them into the refining process along with the normal crude feedstock. *Id.*

One of the main issues in the case is whether EPA's final regulations are arbitrary, capricious, or out of the agency's statutory authority. The court clarifies that under the EPA's final rule, reprocessed ore and the metal derived from it constitute solid waste. The mining industry typically recaptures, recycles, and reuses these dusts. This usually takes place in production processes different from the one which the dusts were originally emitted. *Id.* at 1181. American Mining Congress felt the regulation crossed over EPA's authority. The court decided that the regulation of materials reused or recycled in an ongoing manufacturing or industrial process was not necessary because they are not yet part of the waste problem.

Through its analysis, the court decided that Congress intended EPA's authority to extend to materials that are truly discarded, disposed of, thrown away, or abandoned. The court is limiting on-going production processes from regulation. However, it states that waste disposal indisputably falls within EPA's jurisdiction. *Id.* at 1191.

The case refers to a Report of the House Committee on Energy and Commerce (H.R. Rep. No. 1491, 94th Cong., 2d. Sess. at 4). The report clarifies that the Agency has the authority to regulate materials used, reused, recycled, or reclaimed because they may be hazardous wastes. It also stated that these recycling activities constitute hazardous waste treatment, storage, or disposal in certain instances.

What ultimately came from this case is that EPA's final rule is not arbitrary and capricious. However, EPA cannot regulate in process secondary materials. The case for the purpose of use, reuse, and reclamation made some clarifying points. It facilitated certain exemptions and stated areas where recycling is hazardous waste management.

After this case, the EPA clarified its rules in the January 8, 1988 Federal Register. It stated "that the ultimate jurisdictional test is whether these materials are being utilized in an on-going continuous manufacturing process." 53 Fed. Reg. 519, 521. A paramount question in this test is how are the materials being stored. For example, if they are stored underwater or in a way similar to land disposal the recycling activities may involve solid waste management. Thus, the EPA would have jurisdiction to regulate. The September 13, 1988, final rule also stated that "surface impoundments in the primary lead industry are not part of the primary lead production process, and that the solids in these impoundments are not in-process materials but rather are generated incidentally in the course of waste water treatment." 53 Fed. Reg. 35412. In order to test if a material is in-process, look at how the materials are stored and handled as opposed to that of raw materials in the industry. This is another way to gage if they are truly in-process materials or if they are hazardous wastes.

In the January 8, 1998 proposal, the EPA stated that reclamation remained a difficult category because certain reclamation activities involve on-going production activities, while others are forms of waste management. "The existing rules thus classify sludges and byproducts as solid wastes on a case-by-case basis based on factors which distinguish on-going manufacturing from waste management." 53 Fed. Reg. at 522. This clarifies how the EPA will regulate these activities. The EPA will impose the

jurisdictional test of whether the materials are in an on-going process. If it is not an on-going process, the materials are hazardous wastes. The January 8, 1988 proposal also states that "[s]pent materials requiring reclamation, on the other hand, are not directly usable in on-going manufacturing processes, because, by definition, they are no longer usable and must first be restored to a usable condition." *Id.* If a material first needs restoration to a usable condition, then it is a hazardous waste. These materials are not a part of a continuous on-going process and "are disposed of from these processes even if the reclamation activity occurs at the site of generation." *Id.* at 522. The only exception occurs when the reclamation involves closed, continuous processes. This means that a pipe or comparable means connects the operation and "there is no element of disposal involved (such as storage in an impoundment)." *Id.* This proposal reiterates the final rule of January 4, 1985. It is important because it clarifies when the EPA considers use, reuse, and reclamation activities, uses that constitute disposal. There is no final rule to this proposal.

In May of 1998, the EPA released a final rule regarding the treatment and storage of hazardous materials. There were three main issues discussed in this Federal Register. The first issue is whether, if a material is recycled within the mineral processing industry it is a solid waste. The second issue is whether there is land placement of the mineral processing secondary material before recycling, or during the recycling process. The final issue is whether if a material is a waste, is the waste a beneficiation/extraction waste or one of the mineral processing wastes that are excluded from Subtitle C regulation under the Bevill exclusion. 63 Fed. Reg. 28556, 28577. The first two issues are the ones of importance in determining the differences between use, reuse and reclamation.

It is important to discuss land disposal in regards to the mineral processing industry "because this industry recycles mineral processing secondary materials that exhibit hazardous waste characteristics, and sometimes uses land-based units-piles and impoundments to store these materials before recycling." *Id.* at 28578. If a material is stored in a land based impoundment before recycling (no matter if it is use, reuse or reclamation), it is possible that the material will enter the environment and cause harm.

The May 1998, final rule minimally amends the current RCRA rules by defining which secondary materials generated by and reclaimed by mineral processing or beneficiation facilities are solid wastes. The rule states that the "EPA is thus essentially disclaiming authority over mineral processing secondary materials that are reclaimed within the mineral processing or mining/beneficiation industry sector, so long as there is no land–based storage preceding reclamation." *Id.* at 28578. This deals more with on-going production. Once a material is stored, it shows an element of disposal and thus makes it a waste, which the EPA will regulate. The EPA states that there is not an absolute jurisdictional bar to regulating any management of mineral processing secondary materials, which are reclaimed within the industry. "The only absolute bar on the Agency's authority to define recycled mineral processing secondary materials as solid wastes is for 'materials that are destined for immediate reuse in another phase of the industry's ongoing production process' and that have not yet become part of the waste disposal problem." *Id.* at 28580. The Agency decides on a case-by-case basis what is waste management. The Agency will not have jurisdiction over in-process materials. A caveat to this is that the EPA does not view mineral processing secondary materials which have been removed from the production process for storage as being immediately

reused, thus granting jurisdiction. This allows the EPA to have jurisdiction over materials that may become part of the waste disposal problem. The Agency has jurisdiction over any materials stored on the land or in disposal units. *Id.*

A process similar to on-going production where the EPA has jurisdiction is where secondary materials are reclaimed at the generating site, but where the process is non-continuous due to storage of materials. The EPA had discretion to consider whether situations utilizing reuse or reclamation involve solid wastes. As long as it is not a continuous, process EPA may have jurisdiction. The Agency cites to *American Mining Congress v. EPA* 907 F.2d at 1186. It states "the leading authority for this approach is AMC II, where the Court found that secondary materials generated and reclaimed on-site could be classified as solid wastes because they were stored in surface impoundments." *Id.*

The EPA considers land-based storage as part of the waste disposal problem and thus derives regulation. If there is no element of disposal or discard, the Agency will not institute jurisdiction.

V. Conclusion

Considering all of the factors discussed above, there are distinct differences among use, reuse and reclamation. "A material is recycled if it is used, reused or reclaimed."" 40 C.F.R. § 261.1(7). Thus, recycling is the broad category that encompasses all three. Each component of recycling is distinct. The Environmental Protection Agency must protect the environment and ensure the safe handling of solid and hazardous wastes. Therefore, the Agency has jurisdiction over recycling activities as long as they are not part of a continuous on-going production process. The Federal

Register proposal of April 4, 1983 and the final draft of January 4, 1985 as well as current Federal Register's and case law, are significant in determining whether there is a difference between use, reuse and reclamation. Reclaimed material is material that is processed to recover a usable product or is regenerated for further use. Activities involving use and reuse do not constitute reclamation.

The Agency has discretion over its jurisdiction. If a material is part of an on-going production process there is no jurisdiction. However, if a material is stored or treated in a way similar to disposal, the Agency has discretion. In most situations, the EPA has jurisdiction to decide if a secondary material used, reused or reclaimed is a hazardous waste.